Language Access Accountability for Health Equity

Public Comment on HB 2359

In January 2021, the AMA Journal of Ethics published an article that concluded:

> *Health care organizations and clinicians have a moral imperative to reduce and ultimately eliminate the injustice experienced by patients with LEP. Health care organizations should do so… by responsibly staffing and clinicians by using available interpreting services and advocating for systems-level changes that make language skills an aspect of diversity rather than a barrier to quality health care…There will be prejudices and assumptions to overcome and financial and logistical barriers to cross.*
>
> How Should Clinicians Respond to Language Barriers That Exacerbate Health Inequity?
> https://edhub.ama-assn.org/ama-journal-of-ethics/module/2775814

Background

HB 2359 (The Health Care Interpretation Accountability Act) should change language access in Oregon, in line with OHA's mission/vision to "create health equity where all people can reach their full health potential and well-being and are not disadvantaged by their race, ethnicity, language, disability, national origin, or intersections among these communities or identities."

This legislation introduces **accountability** into the equation in Oregon given historic systemic failures to comply with existing federal and state laws that guarantee the right of patients to receive competent language access services, including interpreter services, at no cost. Multiple stakeholders took part in those early conversations, most significantly interpreters and limited English proficient (LEP) individuals who rarely have a seat at the table in these matters that most impact them.

Volumes of public testimony from the legislative process to pass HB2359 speak to these priorities including personal experiences and describing quality issues when working with uncredentialed interpreters. A small sample:

> *"To have quality interpretation, I can understand many things and get the main ideas, even though I don't speak fluent English. This means many times I understand when interpreters do not interpret accurately but cannot correct the errors. Can you imagine how frustrating that is?"*
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> *Eyelin Sardiñas Neninger*
> *(Spanish-speaking community member)*

> *"I saw many medical professionals struggle and often eventually dismiss their patients who weren't able to communicate effectively. I also saw many Deaf patients who recounted horror stories of [well-meaning] but unqualified ASL Interpreters who either gave them or reported misinformation. I still chat with Deaf people who tell me their doctor said XYZ about a medical condition that's blatantly inaccurate and born out of miscommunication.*

Deaf/DeafBlind/Hard of Hearing people are not in a position of power to demand qualified ASL Interpreters. When faced with doing what's right or defaulting to what's easy, organizations often choose the later. As a body of power, the Oregon Legislature does have the ability to protect this marginalized community. It's a matter of equity, it's a matter of doing the right thing for your constituents who can't do this for themselves."

Sharon Meyers (Deaf Physician)

"I am a qualified health care interpreter and my languages are remote and work consistency is very low. ...I constantly heard lectures from all sections that healthcare interpreters need to invest time and money to take training, follow the ethics, the best practices, and so on, yet I have regularly seen interpreters with no credentials being used to interpret in healthcare settings. .... What is the need for investing time and money to get credentialed and be on the OHA registry if agencies keep using low-cost uncredentialed bilinguals? The lockdown during the pandemic was an eye-opener. Despite being essential workers, we live as an unprotected community, with no unemployment benefits or worker's compensation adding to the already uncertain hours and income."

Sanjoy Dutt (Qualified Interpreter)

"As a culturally Deaf person I support the HB 2359 bill to protect sign language interpreters' and Deaf/Hard of Hearing patients' rights. I've seen several medical centers try to obtain cheap interpreting service by using remote video interpreting service instead of onsite interpreting service. The remote video interpreting service has provided random and available interpreters with no health care experience. Most of Deaf/Hard of Hearing patients don't speak or write proficiently in English. Their proficient language is sign language, and they require high qualified interpreters to have efficient communication with health care providers. We have study findings to show that the use of professional interpreters with health care experience has raised quality of health care for limited English proficiency patients, and it has also reduced communication and comprehension errors. The errors have resulted in the majority of adverse effects in patients."

Joanel Lopez (Deaf community member)

"Among the four Thai interpreters that I had, one person was unprofessional. She was nosy, intrusive, and made a hurtful comment about my personal life. She made me angry and I did not know what to do or where to go for help. I was afraid of telling her or anyone about her inappropriate behavior lest I leave myself open to revenge or retaliation should we meet again in the future. As a patient and consumer, I hope to be able to make an anonymous complaint in my preferred language…While I still struggle with English, and still rely on medical interpreters to communicate with providers, I am asking you to help me and other English learners not to have negative experience by having an interpreter who is unprofessional or getting an interpreter for the wrong language. The consequences of not having quality control measures in place could mean life and death. We need to make sure that only certified or qualified medical interpreters are helping English learners."

Anonymous (Thai-speaking community member)

Policy Recommendations

We recommend that three essential components be included explicitly in Rule: clear compliance guidance, explicit enforcement actions when noncompliance occurs, and an accessible complaint process. We also recommend that OHA abide by recommendations from the Oregon Council on Health Care Interpreters (OCHCI) and RAC regarding Certification.

Clear Guidance on Compliance

For effective enforcement of the requirements for health care providers, more detail must be provided in Rule. It is true that getting too many details in Rules can cause problems with compliance; it is also true that providing too little guidance can have consequences that should be considered equally concerning.

Further, there is precedent for OHA not providing sufficient guidance in this arena. An Office of Inspector General Audit Report for the Health Services Division entitled "Oregon's Oversight Did Not Ensure That Four Coordinated-Care Organizations Complied With Selected Medicaid Requirements Related to Access to Care and Quality of Care" stated that [language] access issues occurred because "(1) Oregon provided insufficient oversight of, and guidance to, the CCOs and (2) the CCOs provided insufficient oversight of, and guidance to, their subcontractors."

Specifically, we recommend that:

- **Rule must be explicit as to the expectations depending on whether providers hire interpreters as staff, hire interpreters directly as contractors, or book interpreters through language companies. We recommend that Rule include these expectations:**
    - When health systems hire interpreters directly, whether as contractors or W-2 employees, they must hire only interpreters on the OHA registry.
    - When health systems hire interpreters through language companies, the language service companies handle the logistics of scheduling an interpreter, including presumably, verifying the credentials for the interpreters with whom they contract. Rule should direct that provider contracts with language companies explicitly state that the language company is responsible for confirming an interpreter's credentials, and maintain a record confirming their efforts to reach out to interpreters on the Registry in the event that the interpreter covering the appointment was not on the Registry. This would allow the health system to have the information to comply with the law.
- **Health systems contract with language companies that hire credentialed interpreters listed on the Registry.** (If Language Company A does not pay well enough to be able to hire any credentialed interpreters, and Language Company B hires exclusively interpreters on the OHA registry, then health systems choosing to work with Language Company A to cut costs should not be considered compliant.)
- **Rules specify that the administrative steps to secure credentialed interpreters should take place outside of the encounter and should not affect patient care.** There was concern among some RAC members about whether providers would need to spend time reaching out to interpreters on the registry and/or verifying credentials themselves,

potentially delaying patient care. This is an example of why this explicit direction is necessary. At the time of service, the only charting should be the interpreter's name, registry number and language; searching the registry at that time should not be necessary. If the interpreter does not provide a registry number, the provider could use a quick standardized dot phrase explaining the clinic/hospital's method for securing credentialed interpreters.

- **Specify "health system" rather than "provider" in Rules** to clarify that the person in the room with the patient is not responsible for all the steps prescribed in OARs.
- **Rules provide specific guidance regarding standard phrases to document attempts to secure a credentialed interpreter.** This would help health systems and language companies focus their efforts and energy into supporting interpreters to get credentialed and not in struggling to come up with their own ideas of what "documenting efforts" means.

Enforcement action

Accountability is a crucial component of this bill. Existing state and federal laws have been inadequate to ensure credentialed interpretation services. The title of the bill itself, "Health Care Interpretation Accountability Act," and the whereas statements speak to the pressing need to hold accountable those responsible for ensuring access to interpreting services:

> *Whereas current law does not hold accountable health care providers and interpretation service companies for failing to work with qualified or certified interpreters or for failing to work with best practices in providing health care interpretation services;*
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> HB 2359, Whereas Statements

Accountability should be incumbent upon several stakeholders: interpreters, providers, CCOs, and language companies. The bill sets up sections dedicated to different stakeholders, and specifically enables OHA to enforce the section of the bill related to health care providers:

> **SECTION 3. Section 2 of this 2021 Act may be enforced by any means permitted under law by:**
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> **(1) A health professional regulatory board with respect to a health care provider under the jurisdiction of the board.**
>
> **(2) The Oregon Health Authority or the Department of Human Services with regard to health care providers or facilities regulated by the authority or the department and health care providers enrolled in the medical assistance program.**
>
> **(3) The authority with regard to emergency medical services providers licensed under ORS 682.216 and clinical laboratories licensed under ORS 438.110.**

One approach to enforcement, which OHA seems poised to adopt based on its response to RAC recommendations in February, is to rely on other entities (such as licensing/certification boards and the Medicaid program) to verify compliance, and expect them to be responsible for enforcement. However, by adopting this approach, OHA would lose the opportunity to ensure an accessible, equitable process.

We recommend that OHA:

- **Document a clear plan for monitoring compliance.** This could include, but is not limited to, reviewing quarterly language access reports and reviewing information submitted by health systems as to why they were unable to secure interpreters.
- **Document in Rule a clear strategy for responding to complaints.** Such a strategy could include corrective action plans, fines, or any measure that would ensure that issues are addressed. Currently, there is not a defined response to complaints made through the interpreter complaint form.
- **Specify in Rule consequences to lack of compliance.** We recommend that when a founded complaint is made, or when OHA identifies noncompliance through its verification process, enforcement action should be taken. Such enforcement action could include penalties, fines, or even loss of contracts for CCOs, and possible enforcement actions should be specified in the Oregon Administrative Rules. As it stands, there is no clarity on the consequences of noncompliance with the requirements set forth in Rule.

Accessible complaint process

We recommend an accessible, user-friendly complaint process for language access issues, with the following components:

- **Complaints can be brought against uncredentialed interpreters, health systems, and language companies.** The current complaint process allows for complaints against credentialed interpreters only.
- **A language access complaint form** posted to the OEI website in English and at least the 15 most common non-English languages in Oregon, allowing complainants to respond in their preferred language. To ensure accessibility to all complainants, the form would need to be made available in sign language and in alternate formats as well.
- **A notice indicating that the complaint form can be made available in other languages and formats upon request**, and that the form be translated into requested languages within 30 days. RAC members brought up the importance of accountability and the development of a complaint process. This is a crucial piece of OHA's plan to eradicate health disparities by 2030. Yet OHA's response has been to direct questions about a complaint process to other entities. OHA also stated that *complaints can be provided in a person's preferred language and is covered by "any other format." [sic]* OHA took nearly two years (March 2020-February 2022) to fulfill a request to translate the existing interpreter complaint form into Thai, suggesting that in the absence of an explicit requirement in, translations are not made available in a timely manner. Rule should specifically state that "any other format" includes language translation, and any tagline mentioning accessibility in alternative formats and languages should be posted in prevalent non-English languages. In addition, OARs should specify a turnaround time for the provision of documents in alternative languages or formats.

- **Anonymous complaints are permitted and the complaint form indicates that retaliation against complainants is prohibited** to make the complaint process approachable to all complainants, especially those who fear retaliation because of their immigration status.

Language companies may have their own internal processes for handling complaints, but without regulation of what those processes look like, they vary widely, and there is no aggregate data to evaluate the extent of issues.

A centralized complaint process would prevent interpreters who are not meeting quality standards from simply moving from one language company to the next and would ensure that patients and interpreters, not just health system workers, could make complaints. It would also ensure an equitable, consistent, fair complaint-handling process untarnished by financial motives. The complaint process would permit complaints against both credentialed and uncredentialed interpreters, health systems, and language companies.

Abide by RAC and Council Recommendations Regarding Certification

RAC members and members of the Oregon Council on Health Care Interpreters (OCHCI) expressed concern that making Certification optional would discourage interpreters from becoming Certified. The OCHCI has suggested several alternatives to this approach. At the last OCHCI meeting, the Education and Training Committee (ETC) brought forward a recommendation to set thresholds beyond which certification would be required, and the recommendation was passed unanimously by the full OCHCI. Additional recommendations under consideration include detailed ways in which to more closely align Qualification and Certification requirements in order to promote parity in the process for credentialed interpreters. Given the diversity of stakeholders who have expressed concern with this particular recommendation, including the body of subject matter experts tasked with advising OHA on these matters (OCHCI), it would be prudent to remove this from the Rule and continue conversations to design an alternative. One suggestion is to do away with qualification for any language for which certification is an option.

We recognize that DOJ has made this recommendation based on their concerns for potential lawsuits stemming from a complaint, and acknowledge that this is a concern for OHA. It is equally important to consider the impact of this decision through an equity lens, and we feel confident that given the chance, these entities can combine our expertise and design an equitable alternative solution. Despite the explicit requirement in the bill for decisions to be made in collaboration with OCHCI, that did not occur with this recommendation.

<u>Conclusion</u>

It is time for the Oregon Health Authority and other stakeholders to place these rulemaking decisions in the context of furthering racial equity and to “transform our institutions and structures to create systems that provide the infrastructure for communities to thrive equally. This commitment requires a paradigm shift on our path to recovery through the intentional integration

of racial equity in every decision" (State of Oregon Diversity, Equity, and Inclusion Action Plan: A Roadmap to Racial Equity and Belonging, September 2021).

> **"For far too long, the longstanding systemic barriers built into government systems have left communities of color behind in accessing the programs and services that would offset the effects of history**…***Racism is insidious, and racist policies and practices have undergirded the nature of our economy. Getting at these deep roots requires specific attention to ensure we are being proactive to embed anti-racism in all that we do and to minimize the negative, disproportionate outcomes experienced by communities of color."***
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> —Governor Kate Brown, foreword, State of Oregon Diversity, Equity, and Inclusion Action Plan: A Roadmap to Racial Equity and Belonging, September 2021